PROVINCIAL COURT OF NEW BRUNSWICK

JUDICIAL DISTRICT OF SAINT JOHN

Citation: Saint John Police Force v. Canadian Broadcasting Corporation Et al 2012 NBPC 17

IN THE MATTER OF AN APPLICATION BY THE SAINT JOHN POLICE FORCE FOR THE EXTENSION OF A SEALING ORDER DATED DECEMBER 15, 2011 IN RESPECT OF A SEARCH WARRANT AND A PRODUCTION ORDER ISSUED IN RELATION TO THE RICHARD OLAND HOMICIDE INVESTIGATION.

Date: September 28, 2012

Date(s) of hearing: June 15, 2012
June 27, 2012
July 31, 2012
August 13, 16 & 17, 2012

Appearances:

John Henheffer and Patrick Wilbur	- for the Attorney General of New Brunswick on behalf of the Saint John Police Force
David Coles, Q.C.	- for the Canadian Broadcasting Corporation and the Telegraph Journal
William H. Teed, Q.C. and Gary Miller	- for the Interested Parties

JACKSON, C.P.C.J.

Introduction:

[1] On July 7, 2011 the body of Richard Oland, a prominent Saint John businessman, was found in his office in downtown Saint John, and the Saint John Police Force (the "Police") immediately commenced a homicide investigation.

[2] In the course of that investigation, the Police obtained and executed several search warrants and a production order which were issued by Judge William McCarroll, all of which were ordered sealed.

[3] On September 22, 2011, Counsel for the Canadian Broadcasting Corporation applied for a variation of the sealing orders and following a hearing, I ordered on December 15, 2011 that all records relating to the warrants and production order continued to be sealed until June 15, 2012.

[4] The Police now apply for a further extension of the sealing orders; which application is opposed by the Canadian Broadcasting Corporation and the Telegraph Journal (the "Media"), but consented to by Messrs Teed and Miller on behalf of the Estate of the deceased, and individuals I will identify only as D.O., L.O, J.C., and M.B.W. (collectively

the "Interested Parties"), all of whom are either members of or closely connected to the Oland family.

Facts

[5] In support of their application, the Police filed the Affidavit of Cst. Stephen Davidson, a member of the Major Crime Unit of the Police, who also testified and was cross examined by all counsel during an *in camera* hearing.

[6] The following Warrants and Order, along with their respective Information to Obtain and Report to a Judge were ordered to be sealed:

> (1) Search Warrant of July 13, 2011 pursuant to Section 487 of the *Criminal Code*;
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> (2) General Warrant of July 13, 2011 pursuant to Section 487.01 of the *Criminal Code*;
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> (3) Search Warrant of July 20, 2011 pursuant to Section 487 of the *Criminal Code*;
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> (4) General Warrant of July 20, 2011 pursuant to Section 487.01 of the *Criminal Code*;
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> (5) Production Order of July 25, 2011 pursuant to Section 487.012 of the *Criminal Code*;
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> (6) General Warrant of August 4, 2011 pursuant to Section 487.01 of the *Criminal Code*;
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> (7) Search Warrant of August 11, 2011 pursuant to Section 487 of the *Criminal Code*;
>
> (8) Search Warrant of November 15, 2011 pursuant to Section 487 of the *Criminal Code*;

(9) General Warrant of November 15, 2011 pursuant to Section 487.01 of the *Criminal Code*.

[7] Cst. Davidson testified that the Richard Oland homicide investigation is an ongoing investigation which the Police are diligently pursuing and that, although the Police have a suspect in mind, no one has been charged with any offence in relation to Richard Oland's death. The Police oppose the release of any further information from the above documents other than the admittedly heavily redacted versions which were made available to the public on August 17, 2012, on the basis that the release would compromise the nature and extent of an ongoing investigation and that it would prejudice the interest of innocent persons.

[8] The Police have redacted the names and the statements of all third party witnesses, that is, persons who are neither suspects or persons of interest in the investigation, claiming privacy interests of those persons. Both Counsel for the Interested Parties oppose the release of the names of their clients on slightly different privacy concerns arising from the intense media interest that this case has attracted. They assert that their clients have already been the subject of speculation as to their involvement in the crime, and to release further information

would merely increase this unwanted intrusion into their private lives. Their position is that the media have already enough information and "enough is enough".

[9] The Search Warrant and General Warrant of November 15, 2011 (items 8 & 9 on the list in paragraph 6, above), relate to an item, the "log book", which was originally given to the Police by an Oland family member; however when the Police wanted to subject the item to forensic testing procedures, consent for the Police to retain the item was withdrawn. The Police, quite legitimately, obtained a warrant to "seize" the log book and a general warrant to allow for the forensic testing. It is common ground that nothing of forensic or evidentiary value has been obtained from either the Warrant or the General Warrant and Mr. Teed submits that those two items should remain sealed.

Analysis and Decision

[10] Legislative authority for the sealing of a search warrant and associated documents is found at section 487.3 of the *Criminal Code* which provides:

> **"487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section**

529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant or authorization on the ground that

(*a*) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

(*b*) the ground referred to in paragraph (*a*) outweighs in importance the access to the information.

(2) For the purposes of paragraph (1)(*a*), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(*a*) if disclosure of the information would

(i) compromise the identity of a confidential informant,
(ii) compromise the nature and extent of an ongoing investigation,
(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
(iv) prejudice the interests of an innocent person; and

(*b*) for any other sufficient reason.

It is common ground that the provisions of s. 487.3(2)(a) (i) and (iii) do not apply in this case.

[11] In Toronto Star Newspapers Ltd. *v.* Ontario, [2005] 2 S.C.R. 188 Fish, J. reviewed the history of publication bans and the open courts principle saying:

> "1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> 2 That lesson of history is enshrined in the Canadian Charter of Rights and Freedoms. Section 2(b) of the Charter guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized...

7 In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter*.

8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result."

[12] He continued at paragraphs 23-27:

"23 Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled ...

26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
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> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]

27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real*, *substantial*, and *well grounded in the evidence*: "it is a serious danger sought to be avoided that is

> **required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34)." (Underlining added, italics in original)**

[13] In Toronto Star (Supra), the Crown sought to support the sealing order based on the evidence of a police officer that:

> **"[36]...based on [his] involvement in this investigation that the release of the Warrants, Informations to Obtain and other documents would interfere with the integrity of the ongoing police investigation" (Appellant's Record, at p. 70). The officer stated that, should the contents of the information become public, witnesses could be fixed with information from sources other than their personal knowledge and expressed his opinion "that the release of the details contained in the Informations to Obtain [the search warrants] has the potential to make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of its investigation"**

which is in substance the same reasoning proffered by Cst. Davidson in this matter. In rejecting the appeal Fish J. said:

> **[39]...In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the very least allege a *serious and specific risk to the integrity of the criminal investigation.*" (Underling added, italics in original)**

[14] Winnipeg Free Press 2006 M.B.Q.B. 43 deals with a factual situation similar to this case in that it involved the unsolved murder of the wife of a prominent governmental official in Winnipeg. One of the grounds on which continued sealing was sought was the release of unique forensic evidence known only to the killer. McKelvey J. noted at paragraph 71:

> "[71] These types of cases are very difficult. In these circumstances, the R.C.M.P. is seeking to limit public access to information on the basis that resultant publicity through the media would harm the nature and extent of an ongoing investigation and subvert the ends of justice. The R.C.M.P. is put in an unenviable position of endeavouring to support an application by reliance upon, in some respects, generalized assertions. However, to do otherwise or to give specifics could well result in jeopardizing the very information that is sought to be protected by the R.C.M.P. from coming into the public domain. Further, it must be considered that serious risks to the administration of justice during the investigation stage may be irrelevant by the time of a trial. However, " ... the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage." (*Toronto Star*, para. 8.)
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> [72] Mr. Justice Fish, writing for the Supreme Court in *Toronto Star*, was clear that generalized assertions may be insufficient to support a sealing order. However, those assertions compounded with an ability to review the entirety of the file and information within it, as well as considering the basis upon which the assertions are made, affords a judge the ability to make such discretionary decisions. The flexible and contextual process adopted in this case facilitated such an ability.
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> [73] There must be a careful consideration as to the circumstances in which a sealing order is sought. In

> this case, what is sought to be sealed relates substantially to unique forensic evidence. This evidence could only be known by the person who killed Beverly Rowbotham or by an as yet undisclosed witness. While there is unquestionably a public interest in the openness of the legal process, there is an equally relevant public interest in the resolution of this crime. There are many aspects of this investigation, particularly of a forensic nature, which should be kept out of the public realm to protect the integrity of this ongoing investigation and to afford an opportunity to solve this senseless murder."

[15] As I noted earlier, the Police in redacting the warrants have redacted the names and statements of all third party witnesses as well as their statements on the basis of privacy interests. I agree with Then J. who said at paragraph 36 of R. v. Eurocopter Canada Ltd., 2003 CanLII 32308 (ON SC):

> [36]...in my view on a proper weighing of the grounds specified under s. 487.3 of the Criminal Code, the request for the protection of a person identified generally as an employee in the Information to Obtain and which is sought on the basis of the "protection of the innocent" is not available. While I greatly sympathize with the situation of the person at issue, the justification put forward that revelation of identity will result in financial loss is insufficient to outweigh the strong presumption in favour of openness of the Courts. See: *Regina and Unnamed Person* reflex, (1985), 22 C.C.C. (3d) 284 (Ont. C.A.) at pp. 286-288; *R. v. McArthur reflex*, (1984), 13 C.C.C. (3d) 152 paras. 12-14 (Ont. H.C.)..."

[16] While I can also sympathize with witnesses who have told the Police certain things in the course of their

investigation, not suspecting that their names may be included in applications for search warrants, the law, as I understand it, does not permit the redaction of their names as long as uniquely private information is not disclosed.

[17] Persons who are the subjects of search warrants also have privacy interests which come into play. In Ottawa Citizen Group v. Canada [2005] O.J. No. 2209, the Ontario Court of Appeal rejected the distinction between persons whose premises have been searched and nothing has been found, and those on whose premises something has been found as it relates to the concept of "innocent person" as that phrase is used in s. 487.3 of the *Criminal Code*. The Court noted that the phrase must be interpreted in the light of a broad range of factors concluding at paragraphs 37-38:

> **"[37] In *Phillips v. Vancouver Sun* 2004 BCCA 14 (CanLII), (2004), 238 D.L.R. (4th) 167 (B.C.C.A.), the court considered the issue of access to a search warrant that had been executed at a police station in furtherance of an investigation into possible offences committed by a police officer. The court discussed *MacIntyre* and rejected the bright line dichotomy interpretation of Dickson J.'s language in that case. Indeed, Prowse J.A. observed, at para. 65, that "in this case, no one seriously disputes that Cst. Phillips qualifies as an 'innocent person' within the meaning of s. 487.3(2)(a)(iv) of the *Code*, given the fact that he was never charged with an offence, and despite the fact that materials were seized from his office in the course of the search."**

> **[38] In summary, I do not think that Dorval J. and Aitken J. erred by concluding that the subjects of the search warrants are "innocent persons" within s. 487.3 of the *Code*."**

[18] In Ottawa Citizen (Supra) the Court noted that there are two parts to the *Mentuck* test: (1) a serious risk to the proper administration of justice, and (2) reasonably alternative measures. MacPherson J.A. accepted the issuing Judges' analysis as to the first part of the test based on the fact that the searches were conducted in the context of international relations and national security as well as privacy and security of the person interests but parted company with them on the question of the appropriate order. On that point he said:

> **"[50] The starting point for the s. 487.3 and *Mentuck* analysis is this fundamental point – Canada is a nation with a profound attachment to a free press and to open courts. The former is explicitly recognized in s. 2(b) of the *Charter*; the latter has been the centerpiece of many leading decisions of the Supreme Court of Canada.**
>
> **[51] Moreover, there is a direct connection between these two fundamental values...**
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> **[54] The consequence of the importance of, and the relationship between, freedom of the press and open courts is obvious: "the open court principle, to put it mildly, is not to be lightly interfered with": see *Vancouver Sun* at para. 26. Accordingly, any attempt by a party to obtain a sealing order in relation to any aspect of a court proceeding, including the obtaining**

> of a search warrant, "must be subject to close scrutiny and meet rigorous standards": see *Toronto Star* at para. 19 *per* Doherty J.A
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> [55] However, although freedom of the press is "largely unfettered", it is not absolute. Press freedom, like all *Charter* rights, must be balanced with other important values in Canadian society. One such value is "the protection of the innocent": see *MacIntyre* at p. 187."

[19] The Order made in Ottawa Citizen (Supra) was that the media could have access to the documents so that they had full knowledge of the contents of the search warrant as well as the information on which it was obtained, but were prohibited from publishing the names of the subjects of the search, or any information that might disclose their names. The Court noted at paragraph 60:

> "[60] If an order coupling access to, but non-publication of, the names were made, [the journalist] would learn the identities of the subjects of the search warrants. She could contact them, which is consistent with the news gathering role that is part of the constitutionally protected freedom of the press: see *Canadian Broadcasting Corporation* at para. 24. The press can contact any Canadian citizen in the investigation of a potential story." (Items in brackets added)

and then continued at paragraph 63:

> "[63] Does such an order properly respect the privacy interests of deemed "innocent persons" in Canada? In my view it does. The order is more intrusive than a sealing order; the press will be able to contact the

> **"innocent persons". However, such an intrusion is, in my view, both normal and minor. It is normal because it is already the law in Canada that search warrants are available for public inspection: see *MacIntyre*. Moreover, the press is already free to contact any person in Canada. The intrusion is minor because the "innocent person" can decline to respond to the press inquiry, and can do so in the knowledge that his or her identity will not be published.**
>
> **[64] Moreover, I note that at the hearing before Dorval J., counsel for the only subject of the search warrants who made submissions, Michael Edelson representing A.A., pitched his submissions almost entirely in terms of "the stigmatization to name and reputation that would follow from publication" and "a certain stigma or stain attached to the name of the individual". This is precisely the risk that can be overcome by a non-publication order."**

[20] Counsel for the Interested Parties have argued for the extension of the sealing order largely on the stigma or stain on the reputation of their client as innocent parties, however their names have already been widely reported in the media, as evidenced by the affidavits filed during the hearing which feature both the names and, in some cases, photographs of at least one of the Interested Parties. In such an instance one may wonder whether a non-publication order would achieve any purpose. In Ottawa Citizen (Supra) MacPherson J.A. concludes as follows:

> **"[65] In summary, the *Mentuck* test requires a balancing between the salutary and deleterious effects of any order that would impinge on freedom of the press. The test also commands a focus on "reasonably alternative**

> **measures". The word "balancing" conjures the image of neutrality or even-handedness. In my view, this image is misplaced. Because of the centrality of a free press and open courts in Canadian society and in the Canadian constitution, there is almost a presumption against any form of secrecy in all aspects of court proceedings in Canada. As stated by Dickson J. in *MacIntyre* at p. 185, "covertness is the exception, and openness the rule.**
>
> **[66] The presumption against secrecy applies, specifically, to sealing orders..."**

[21] After weighing the ground specified in s. 487.3 of the *Criminal Code* as elucidated by the cases referred to above, I have concluded that the Police have not demonstrated a serious and specific risk to the investigative integrity of the Oland homicide investigation; indeed their position is based on vague and general assertions of risk. Other than the issue of hallmark evidence which I did deal with later, there has been no legal basis established for most of the redacting sought to be retained, such as the names and statements of persons who are neither suspects, persons of interest or subjects of search warrants.

[22] In relation to items 8 and 9 listed in paragraph 6, that is the log book Search Warrant and General Warrant, because nothing was found as a result of either the seizure or the forensic analysis, I am of the opinion that those

warrants and all associated documents should remain sealed on the basis of the privacy interests of innocent persons.

[23] I have not been persuaded that the privacy interests of the other Interested Parties require the continued sealing of the remaining warrants and associated documents, as in my view a less restrictive option is available. In the Ottawa Citizen (Supra), one of the subjects of the search warrants was Mahar Arar whose identity and indeed his situation was well known and had been widely publicized. Notwithstanding that the Ontario Court of Appeal allowed the media access to the entire warrant but issued a publication ban as to the identity of the subjects of the warrants. In my view a similar sort of order would be appropriate in this case.

CONCLUSION

[24] I order that the various sealing orders made in relation to items 1 through 7 inclusive in the list at paragraph 6 of this judgment be varied by releasing to the public versions of the documents redacted in accordance with the following directives:

[A] The names of all persons referred to in the various documents, other than those who were the subject of a search warrant, and the substance of their involvement shall be made available to the public subject to the exception below as to hallmark evidence.

[B] In the case of any named person who was the subject of a search warrant, the media shall have access to their names but shall be prohibited from publishing their names or any information by which they may be identified.

[C] All personal identity information such as residential addresses, bank account numbers and names of accounts, drivers licence numbers and telephone numbers shall be redacted.

[D] Information relating to the physical position and condition of the deceased's body when found, as well as the condition of the deceased's office and the location of any of the deceased's personal effects upon discovery of the body, shall be redacted on the basis of it being hallmark evidence, that is, specifically detailed information which only the killer or killers would know.

[25] In order to prepare the redacted materials I will stay this Order until October 5, 2012 at 1:00 PM when the redacted versions of the documents will be available to the public.

R. Leslie Jackson, C.P.C.J.N.B.